UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Community Options NY, Inc.
Employer

Case No. 29-RD-066106

and

Albert Maul Teekasingh
An Individual

and

Community and Social Agency Employees' Union,
District Council 1707, American Federation of
State, County And Municipal Employees Union

THE UNION'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

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March 6, 2012
New York, N.Y.

Pursuant to Section 102.69 of the National Labor Relation Board's Rules and Regulations, Series 8, as amended, Community and Social Agency Employees' Union, District Council 1707, AFSCME (Union) takes exception to the Hearing Officer's Report and Recommendations on Objectives (RRO) in the above-referenced matter as set forth below:

Exceptions

1. The Union takes exception to the Hearing Officer's application of the "tendency-to-influence test". See RRO, p. 21
2. The Union takes exception to the *dicta* footnote 41, that the legality of the agreement's union security clause is in doubt. See RRP, p. 23
3. The Union takes exception to the Hearing Officer's determination that: "In light of the foregoing facts, I find that the [sic] when contract became effective on October 20, nonunion members who were employees for thirty-one days at the time the contract was executed could reasonably infer that they would be obligated to start paying dues immediately." See RRO, p. 23
4. The Union takes exception to the Hearing Officer's determination that: "In these circumstances, I find that employees would reasonably infer that the purpose of the Union's waiver was to induce them to support the Union in the election." See RRP, p. 24
5. The Union takes exception to the Hearing Officer's determination that: "Accordingly, I find that the six month waiver of dues that would have been owed after the election and the waiver of initiation fees constitute an objectionable tangible financial benefit." See RRO, p. 24
6. The Union takes exception to the Hearing Officer's determination that: "Moreover, as noted above, the employees could reasonably infer from the language of the Union

security clause that the dues and initiation fees were owed thirty-one days from the commencement of their employment, i.e., the obligation to pay dues was effective immediately on October 20, and about $16 to $30 in dues payments accrued by the time of the November 10 election." See RRO, p. 24

7. The Union takes exception to the Hearing Officer's determination that: "Accordingly, the waiver in connection with these accrued back dues was also objectionable." See RRP, p. 25

8. The Union takes exception to the Hearing Officer's determination that "the employees could reasonably infer from the language of the Union security clause that the dues and initiation fees were owed thirty-one days from the commencement of their employment. See RRO, p. 25

9. The Union takes exception to the Hearing Officer's determination that Union Organizing Director Mike Green's "interpretation of the contract as related to the date employees became obligated to pay dues" is not in accord with the language of the contract. See RRO, p. 20

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UNION'S BRIEF IN SUPPORT OF IT'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES & RULES

I.

PRELIMINARY STATEMENT

This office is counsel to Community and Social Agency Employees' Union, District Council 1707, AFSCME (D.C. 1707). On January 19, 2012, NLRB Region 29 issued a Report on Objections and Notice of Hearing (RONH) with regard to the decertification election conducted in the above-referenced matter on November 10, 2011.[1] In the RONH, Region 29 found that "substantial and material issues" were raised with regard to Objection Numbers 2 and 3 by Community Options NY, Inc. (COI) with regard to the conduct of the decertification election and determined that a hearing was warranted.[2]

A hearing was held at Region 29 on January 30, 2012 before Hearing Officer Tracy Belfiore in accordance with the RONH. On February 23, 2012, Hearing Officer Belfiore issued a Report And Recommendations On Objections (RRO), in which she recommended that Objection No. 2 be sustained, that Objection No. 3 be overruled, that the results of the November 10 election be voided, and that a new decertification election be conducted.

D.C. 1707, AFSCME submits this Memorandum of Law in support of its Exceptions to the RRO's recommendation that Objection No. 2 be sustained. For the reasons set forth below, another election is not necessary because Objection No. 2 is unfounded and should have been overruled. As demonstrated herein, the results of the November 10, 2011 decertification election should be certified.

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[1] As a result of this decertification election, a majority of the bargaining unit voted in favor of continuing to be represented by D.C. 1707. D.C. 1707 was first certified as the exclusive bargaining representative of this bargaining unit on November 13, 2009.

[2] COI had timely filed 4 objections to conduct affecting the results of the election. Region 29 only overruled objection numbers 1 and 4 in its RONH. On February 1, 2012, D.C. 1707 filed Exceptions to the RONH.

II.

FACTS

On or about October 5, 2011, Petitioner Albert Maul Teekasingh (Teekasingh) filed a decertification petition with NLRB Region 29. In accordance with a stipulated election agreement, the parties agreed to conduct the decertification election on November 10, 2011. In the interim period prior to the decertification election but subsequent to Teekasingh filing the decertification petition, D.C. 1707 and COI concluded negotiations for an initial collective bargaining agreement (agreement). The agreement was ratified by the bargaining unit on October 20, 2011, which also was its effective date. See Joint Exhibit 1.

Article 2 of the agreement contains a Union Security and Dues Checkoff provision that provides in pertinent part: "[a]ll employees covered by this Agreement, as a condition of employment, shall be or become members in good standing of the Union no **later than the thirty-first day following the beginning of employment hereunder,** [sic] Employees who are members of the Union shall remain in good standing for the duration of their employment." (emphasis supplied). Joint Exhibit 1, p. 2. Pursuant to the plain meaning of Article 2, bargaining unit members were not required to become members of D.C. 1707, and thus commence paying dues until November 20, 2011, which was thirty-one days after October 20, 2011- the ratification/effective date of the agreement and the date that current employees commenced working under its terms.[3]

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[3] COI had submitted a memorandum to its employees prior to the conclusion of negotiations that stated that "all employees [are required] to pay dues within thirty days of the ratification of the Agreement or thirty days from the start of employment." Union Exhibit 2. Hearing Transcript (Tr.), p. 90. Despite COI's submission of this memorandum, several

While the union security article mandates that bargaining unit members join the union, there is no actual provision in the agreement that requires D.C.1707 to assess or collect union dues or initiation fees. Article 2 (6) merely requires COI to commence dues deduction upon receipt of signed authorization cards from employees covered by the agreement.[4] Un-rebutted testimony revealed that to date, no bargaining unit member has signed or been required to sign an authorization card. Nor had any authorization cards been tendered to COI. [The authorization form is attached to Joint Exhibit 1 as Exhibit A]. See Tr., p. 110.

Testimony provided by D.C. 1707 Director of Organizing Michael Green (Green) revealed as well that no bargaining unit member has been required to pay dues or initiation fees since this unit was certified and that a dues and initiation fee waiver is applicable to every newly organized bargaining unit until a collective bargaining agreement is ratified for that unit.[5] In fact, Green testified that as long as he has been employed with D.C. 1707, newly organized units have been totally exempted from paying initiation fees. Tr., pp. 105 & 117-18.

During the hearing, Gordon Harris, a bargaining unit member who participated in the

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bargaining unit members testified at the hearing that they believed that the dues obligation commenced immediately upon ratification of the agreement. However, none of them were actually aware of or had read the agreement's Union Security provisions. Tr., pp. 32, 49, 63 & 81. Contrary to the RRO's determination, because this memorandum properly interpreted the union security clause, it was not reasonable for these employees to believe that their dues payment obligation commenced immediately. RRO, p. 23.

[4] The agreement also requires bargaining unit members who do not sign authorization cards to pay dues directly to the union. The direct payment requirement presupposes that the individual actually has a dues obligation to D.C. 1707.

[5] Pursuant to a subpoena issued by the NLRB, D.C. 1707 produced a copy of its Constitution. See Joint Exhibit 2. There is no section of the agreement that requires D.C. 1707 to abide by its Constitution. Nor is there any provision in the agreement that allows COI to enforce D.C. 1707's Constitution. By its terms, the Constitution permits exemptions from the initiation fee. Joint Exhibit 2, Article III, Section 2 (h). Finally, Green testified that historically, D.C. 1707 AFSMCE has always permitted the waiver of dues and initiation fees for newly organized bargaining units prior to the implementation of a collective bargaining agreement. Likewise, D.C. 1707 has permitted other bargaining units to have a moratorium on dues and initiation fees after the effective date of their collective bargaining agreement due to lesser than expected wage increases. Green testified that this was the case with Institute for Community Living (ICL) as well as COI.

negotiations as a member of the D.C. 1707 bargaining team, credibly testified that after the union had agreed to COI's 1.5 % wage proposal in June 2011, he requested that D.C. 1707 consider a further dues and initiation fee waiver since the wage increase would apparently not cover bargaining unit members' dues obligations. Tr., p. 96. As a direct result of this request, D.C. 1707 permitted a six month dues moratorium for all bargaining members running up through six months from the effective date of the agreement (June 2012).

Green testified that the six month waiver was announced to and discussed with approximately twenty-five to thirty bargaining unit members during the October 20, 2011 contract ratification vote. Tr., p. 124.[6] Bargaining unit members were advised that the reason for the waiver was the low wage increase negotiated in the agreement. Green also testified that the waiver was available to all bargaining unit members whether or not they supported or joined the union prior to the election and whether or not they voted in the decertification election. In fact, Green verified that Petitioner Teekasingh is also entitled to the waiver. Likewise, employees hired before the election who did not meet the stipulated election eligibility criteria and who for that reason did not vote in the election were entitled to the waiver. Finally, employees who were hired after the date of the election were entitled to the waiver. Tr., pp. 114-15.

After the contract was ratified but before the decertification election occurred, COI submitted to bargaining unit members a flyer that erroneously advised them that the wage increase agreed to in the agreement was not sufficient to cover their union dues obligation.

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[6] Understandably, the dues and initiation fee waiver was first announced to the bargaining unit at the ratification vote for the new agreement, right after negotiations had been completed. It was at this point in time, immediately prior to the contract becoming effective, that bargaining unit members would be most concerned about their financial obligations to D.C. 1707.

Union Exhibit 1.[7] In response to COI's flyer, in order to ensure that bargaining unit members correctly understood their dues payment obligations, D.C. 1707 promulgated its own flyers to counter COI's contention that the wage increase was not enough money to cover employees' dues obligation. The Union's first flyer stated: "The fact is, due to the difficult economic times that we are in, DC 1707 will waive dues payment for 6 months and there will be no initiation fees for anybody currently working at Community Options." Employer Exhibit 1.[8] The second flyer stated: "In terms of union dues, there is a six-month dues waiver in effect anyway." Employer Exhibit 2.[9]

The decertification election occurred on November 10, 2011. At the time of the election, due to the agreement's Union Security provision, no bargaining unit member owed dues or initiation fees to the Union. Nor had dues or initiation fees been sought of any bargaining unit member.

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[7] In the flyer, COI used a projected dues rate and multiplied that rate by twelve instead of six. For an employee making $300.00 per week, the monthly dues rate is $31.30. Joint Exhibit 2. From June, 2012 that member's dues obligation would only be $187.80 for the year, representing six months because of the dues waiver that D.C. 1707 had previously implemented. See Union Exhibit 1.

[8] The RRO implies that D.C. 1707's promise to waive dues and initiation fees for all employees had an impermissibly coercive effect. RRO, p. 24, However, as noted by the Fourth Circuit, "[t]his is not so, for while any offer to waive initiation fees is an inducement, this inducement does not amount to impermissible coercion in the absence of linkage between the offer and either a pre-election pledge of union support or an actual vote for the union. The fact is that most permissible union and management tactics are inducements designed to persuade or pressure employees to one side or the other." *National Labor Relations Board v. VSA , Incorporated*, 24 F.3d 588, 594 (1994). It would seem to be manifestly unfair to permit COI to spread untruth's about bargaining unit members dues payment obligation without permitting D.C. 1707 to counter them, even if this had the effect of inducing employees to vote in favor of union representation. COI's permissible but untruthful conduct had the effect of inducing employees to vote in favor of discontinuing union representation. D.C. 1707 had the right to engage in the same permissible conduct. See also, *Primco Casting Corp.*, 174 NLRB No. 44 (1969) ("we do not think a desire to make oneself more attractive as a candidate for election, in the case of a union representation election any more than in the case of a political election, is in itself a valid reason for condemning as objectionable an otherwise permissible change in position, particularly where, as here, the change is made in response to legitimate employee demands.")

[9] The statements in these flyers are not subject to varied interpretations, one objectionable and the other non-objectionable. *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB 724, 725 (1974). They are unambiguous and susceptible to only one non-objectionable meaning: that all current employees, whether they support the union or not, will be able to take advantage of a dues waiver for six months from the date the agreement was ratified and will not be subject to any initiation fees.

On November 28, 2011, the ballots were counted at NLRB Region 29 and a majority of votes were cast in favor of retaining representation with D.C. 1707. RRO, p. 2. COI timely filed objections following the ballot count.

III.

ARGUMENT

In her RRO, Hearing Officer Belfiore determined that Objection No. 2 should be sustained, that the results of the November 10, 2011 election be set aside and that another decertification election be conducted. In Objection Number 2, COI asserted that D.C. 1707's six month dues waiver and initiation fee waiver had unlawfully induced bargaining unit members to vote against decertification.

Hearing Officer Belfiore posited two grounds for sustaining this objection. First, she asserted that employees "would reasonably infer that the purpose of the waiver was to induce them to support the Union in the election" and that the prospective waiver of six months dues and waiver of initiation fees constituted an objectionable tangible financial benefit. RRO, p.24. She further determined that since "nonunion members who were employees for thirty-one days at the time the contract was executed could reasonably infer that they would be obligated to start paying dues immediately" based upon the Union Security clause, the waiver of back dues payments allegedly owed between the date the contract was ratified and the date of the decertification election constituted an objectionable financial benefit. RRO, pp. 23-24. As shown below, Hearing Officer Belfiore's analysis is contrary to the facts adduced at the hearing as well

as long standing legal precepts.[10]

It has been long established that a union does not endanger employees' freedom of choice if, prior to a representation election, the union promises to waive initiation fees for all employees in the bargaining unit regardless of whether the employees signed union recognition slips. *Molded Acoustical Products, Inc. v. National Labor Relations Board*, 815 F.2d 934,937 (3rd Cir. 1987); *National Labor Relations Board v. VSA, Incorporated*, 24 F. 3d 588, 594 (4th Cir. 1994) ("union interests may legitimately be served by offering an across the board waiver to all employees, regardless of whether employees show pre-election support"); *NLRB v. Whitney Museum of American Art*, 636 F. 2d 19, 21 (2nd Cir. 1980); *Dening Division, Crane Co.*, 225 NLRB 657, 659 (1976).

As conclusively demonstrated at the hearing, D.C. 1707's waiver of dues and fees was not conditioned upon the employee's support for the union prior to the election. The waiver was available both before, during and after the decertification election to all employees whether they supported the union or not. It is well settled that this form of waiver is not objectionable conduct, regardless of the fact that it was made during the critical period. Thus, the RRO's conclusion that "the six month waiver of dues that would be owed after the election and the waiver of initiation fees" constituted an impermissible benefit, is reversible error and should not be adopted.

Likewise, Hearing Officer Belfiore's assertion that COI's current employees could

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[10] Hearing Officer Belfiore relied upon the "tendency to influence" standard set forth in *Owens-Illinois*, 271 NLRB 1235 (1984) to guide her analysis . RRO, p. 21. This was improper. The determination whether a union's dues/fees waiver constitutes objectionable conduct only requires application of the *Savair* doctrine. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). *Infra*, pp. 10-13.

reasonably infer from the language of the Union Security clause that they owed dues and initiation fees immediately upon the effective date of the agreement is contrary to the reasonable interpretation of that clause[11] and is not supported by either the evidence or the testimony of the witnesses who testified at the hearing. Each of COI's bargaining unit member witnesses admitted on cross examination that they had not actually read the agreement's Union Security clause. Tr., pp. 32, 49, 63 & 81. Thus, their belief that dues were payable immediately upon ratification could not have been premised upon the Union Security clause.[12] Nor was it a reasonable interpretation of that clause.

Based upon the proper interpretation of the Union Security clause, bargaining unit members did not have a binding obligation to pay dues or initiation fees until thirty one days after the date that employees commenced working under its terms.[13] Hence, at the time of the decertification election, bargaining unit members did not yet have an obligation to pay anything to D.C. 1707.

An across the board dues and initiation fee waiver for bargaining unit members who do not yet have an enforceable pre-election dues or initiation fee obligation does not serve as an unlawful inducement for them to vote for the union. *McAllister Towing & Transportation*

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[11] Even COI did not interpret the Union Security clause in this manner. See Union Ex. 2.

[12] Notably, none of these bargaining unit members testified that the dues waiver actually affected how they voted in the decertification election. Thus, their testimony is insufficient to show that the waivers had a reasonable tendency to interfere with employees' free and uncoerced choice in the election. *Good Samaritan Hospital*, 2009 WL 981075 (NLRB Div. of Judges, 2009)(dues refunded prior to a decertification election was not objectionable conduct).

[13] Hearing Officer Belfiore implicitly acknowledges the propriety of this interpretation by stating in the RRO that "employees were required to become members in good standing of the Union no later than thirty-one days following the beginning of employment under the contract." (Emphasis supplied). RRO, p. 23. Current employees did not commence working under the contract until it became effective on October 20, 2011. Thus, under her own restatement of employees legal obligation to pay dues and initiation fees, she must acknowledge that employees had thirty one days from October 20, 2011 (November 20, 2011) to pay dues and initiation fees.

Company, 341 NLRB 394, 419 (2004) ("[t]he Board distinguishes between promises to waive back dues that employees have an enforceable obligation to pay and promises to waive back dues they are not obligated to pay"). A waiver under these circumstances, unlike the waiver of a binding pre-election dues or fee obligation, could not induce an individual who would have normally voted against the union to vote for the union simply to extinguish their debt. Such an individual has no debt to the union at the time of the election and would not be benefitted by such a waiver. As revealed at the hearing, this is the circumstance applicable at COI.

In Objection Number 3, COI asserted that by waiving the dues and initiation fees, D.C. 1707 unlawfully altered the terms of the parties' collective bargaining agreement and unilaterally modified the terms and conditions of employees' employment, in violation of Section 8(b) of the National Labor Relations Act. This objection was unfounded. D.C. 1707 did not unilaterally modify the terms of the agreement, since the agreement itself is silent on the issue of when membership dues are actually payable.

The Hearing Officer correctly recommended that Objection 3 be overruled. A Union's waiver of its Union Security clause does not constitute illegal conduct. *Laborers' International Union of North America*, 322 NLRB 294 (1996). Further, the NLRB has no authority to adjudicate an unfair labor practice charge in the context of a representation proceeding. *Mistletoe Express Service*, 268 NLRB 1245 (1984). The RRO's recommendation concerning Objection No. 3 should, therefore, be adopted by the Board.

On the other hand, as demonstrated at length below, DC 1707's six month dues and initiation fee waiver does not constitute objectionable conduct. Objection No. 2 should have been overruled and the election results certified.

A. Objection Number 2 Should Have Been Overruled

1. Prospective Dues

As revealed in the RONH, there is a wealth of decisional law on the issue whether a dues waiver constitutes objectionable conduct with regard to union representational elections. In the seminal decision involving this issue, *NLRB v. Savir Mfg. Co.*, 414 U.S. 270, the United States Supreme Court held that a waiver of initiation fees for employees who agreed to sign authorization cards *prior* to a representation election was an unlawful inducement since this created a false impression amongst employees concerning the pre-election level of union support.

Clearly, the facts in the instant matter are radically different from those encountered in *Savir Mfg. Co.* Here, every employee, whether or not they had signed authorization cards before or after the election, is entitled to a six month dues waiver. Tr., pp. 114-15.[14] This was the very situation considered in *L.D. McFarland Company*, 219 NLRB 575, 576 (1975), *enf'd.* 572 F. 2d 256 (9th Cir. 1978), a case in which the National Labor Relations Board (NLRB) determined that there was no objectionable conduct.

The determination in *L.D. McFarland Company* and other similar decisions that will be discussed below follow from footnote 4 of *Savir Mfg. Co.* There the Supreme Court stated that:

> The Board argues that unions have a valid interest in waiving the initiation fee when the union has not yet been chosen as a bargaining representative, because "(e)mployees otherwise sympathetic to the union might well have been reluctant to pay out money before the union had done anything for them. Waiver of the (initiation fees) would remove this artificial obstacle to their endorsement of the union." See *Amalgamated Clothing Workers v. NLRB*, 345 F.

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[14] As noted previously, D.C. 1707's flyer stated: "DC 1707 will waive dues payment for 6 months and there will be no initiation fees for anybody currently working at Community Options". Employer Exhibit 2. This waiver is not conditioned on employees' support of the union prior to the election and is available to every bargaining unit member regardless of union affectation.

> 2d 264, 268 (CA 2 1969). While this union interest is legitimate, the Board's argument ignores the fact that this interest can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election. The limitation imposed by the union in this case- to those joining before the election- is necessary only because it serves the additional purpose of affecting the Union organizational campaign and the election.

Id. at 274, fn 4.[15]

In accord with the rationale set forth in footnote 4, the NLRB held in *L.D. McFarland Company* that a union dues waiver extending until a union contract is negotiated did not constitute objectionable conduct during a representational election. *L.D. McFarland Company*, 219 NLRB 575. There the NLRB found that "the waiver of dues and initiation fees here was unconnected with support for the Union before the election, unrelated to a vote in the election, and without distinction between joining the Union before or after the election." *Id.*

Similarly, the NLRB found that a union did not engage in objectionable conduct when it offered an across the board waiver of initiation fees and a delay in the imposition of dues applicable to all employees presently working at the time a contract is ultimately ratified. *Con-Pac, Inc.*, 210 NLRB 466 (1974). Such conduct was found permissible under *Savir Mfg. Co.* because the waiver was also available to those who signed with the union subsequent to the conduct of the representation election. See also, *Endless Mold, Inc.*, 210 NLRB 159 (1975)("[t]he [waiver's] availability to all employees eligible to vote in the election, whether they should join the union before or after the election, ensures that the waiver has not been conditioned upon support for the union in any form during the election"); *Wright Brothers Paper*

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[15] This concept has no less validity in the context of a decertification election, where nonmember employees who have not yet joined the union are deciding whether to remove a bargaining representative.

Box Co., Inc., 261 NLRB 1162 (1982); *Wabash Transformer Corporation*, 210 NLRB 462 (1974); *Paolo's Continental Restaurant, Inc.*, 213 NLRB 557, 562 (1974)("[w]here a union offers to waive or reduce its initiation fee for all employees who join at any time during an organizational stage of representation, prior to, or subsequent to, an election, such a waiver or reduction does not impair the employees' freedom of choice in the election or constitute interference which would warrant setting aside the election."); *Ida Lace, Inc.*, 275 NLRB 211(1985).

In *Dening Division, Crane Co.*, 225 NLRB 657, 659, the NLRB further clarified the circumstances by which a union may permissibly offer to waive dues and initiation fees during the course of a representation election. In *Dening Division, Crane Co.*, the NLRB set forth three conditions that would immunize a dues/fees waiver from objection:

(1) the waiver is unconnected with support for the union before the election.

(2) the waiver is unrelated to a vote in the election.

(3) the waiver is made without distinction between joining the union before or after the election.

Id. at 659. Many circuit courts have adopted this tri-part test and have consistently held "that a union does not endanger the free exercise of employee choice if it does not condition its initiation fee policy on pre-election union support, but rather offers an across the board fee waiver to all employees regardless of pre-election union support." See *National Labor Relations Board v. VSA, Incorporated*, 24 F. 3d 588, 594, fn. 12.[16] It is clear that D.C. 1707's six month waiver of

[16] *In National Labor Relations Board v. VSA, Incorporated*, the Fourth Circuit held that "the crucial distinction in determining whether a proposed waiver of initiation fees is a permissible union tactic is between waiver offers made across the board to all employees regardless of pre-election union support, and waiver offers made only to those employees who manifest pre-election union support or who voted for the Union. The former offers are permissible, the latter are not." *Id.* at 594.

dues and waiver of initiation fees cannot be deemed objectionable conduct because D.C. 1707's waiver satisfies each of *Dening Division, Crane Co.'s* prongs.

The first prong is satisfied because the waiver was not contingent on an employee's support for the union prior to the election. None of the union flyers distributed prior to the election indicated that availability of the waiver was limited to employees who either signed cards or otherwise demonstrated support for the union prior to the decertification election. See Employer Exhs. 1 & 2. Similarly, none of the statements made by union representatives to bargaining unit members prior to the election indicated that the waiver was available only to employees who either signed cards or otherwise demonstrated support for the union prior to the decertification election. Tr., pp. 25-27, 37-38, 78, 83-84 & 86. RRO, pps. 6, 9-10 &17.

The second requirement is satisfied as well since the waiver was unrelated to how the employees voted in the election. None of the bargaining unit employees testified that they were told that they would only be qualified for the waiver if they voted in favor of retaining the union, nor did the union flyers indicate that. See Employer Exhs. 1 & 2; Tr., pp. 25-27, 37-38, 78, 83-84 & 86. Further, the waiver was not implemented because of the pendency of the election, but rather because it was requested by a bargaining unit member in response to the low wage increase agreed to by COI. Tr., pp. 96 & 109; RRO, p. 18. This is clear from the fact that the waiver was announced at the ratification vote for the agreement when the bargaining unit members first learned of what the final contractual terms were. Tr., pp. 102 & 109.

Finally, the last prong is satisfied since the waiver was available to all bargaining unit members whether or not they supported or joined the union prior to the election. Tr., pp. 114-115. In fact, Green testified that the waiver is even available to Teekasingh, the individual

responsible for filing the decertification petition.

Hence, the *Dening Division, Crane Co.* criteria are satisfied by the facts adduced at the hearing. Hearing Officer Belfiore's conclusion that the six month waiver of dues that would have been owed after the election and the waiver of initiation fees constituted an objectionable benefit is contrary to the longstanding NLRB precedents cited above and should be rejected. RRO, p. 24. D.C. 1707's waiver is permissible. *National Labor Relations Board v. VSA, Incorporated*, 24 F. 3d 588; *Molded Acoustical Products, Inc. v. National Labor Relations Board*, 815 F.2d 934; *Dening Division, Crane Co.*, 225 NLRB 657.

2. Back Dues

Furthermore, Hearing Officer Belfiore's conclusion that current employees employed for more than thirty-one days at the time of the agreement's effective date could reasonably infer from the language of the Union Security clause that they owed dues and initiation fees as soon as the contract became effective and that D.C. 1707's waiver of these accrued back dues was also objectionable conduct, must likewise be rejected.[17] RRO, pp. 24-25. First, this determination was not premised upon the actual testimony offered by witnesses at the hearing since none of them had actually read the Union Security provision or COI's synopsis of its terms. Tr., pp. 32, 49, 63 & 81.[18] It was based upon the Hearing Officer's surmise and conjecture.

In fact, her conclusion is contrary to evidence supplied by D.C. 1707 at the hearing.

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[17] Unlike the situation in *Loubella Extendables, Inc.*, 206 NLRB No. 24 (1974), COI employees had not yet become subject to the union security clause at the time of the election and D.C. 1707 never deemed them obligated to pay initiation fees and dues. It would not have been reasonable for them to expect the Union to demand payment.

[18] Michael Samuels testified that he had received COI's bargaining update but that he did not pay any mind to its statement regarding bargaining unit member's dues payment obligation. Union Exh. 2; Tr.,p. 64.

Employees had been notified by COI in a memorandum it had presented to employees prior to the agreement's ratification vote outlining agreed contractual provisions that "the Union Security clause required employees to pay Union dues within thirty (30) days of the ratification of the Agreement or thirty (30) days from the start of employment." See Union Exhibit 2; Tr., pp. 64, 89-90. Given that this document was provided to bargaining unit member employees by COI, it would not have been reasonable for current employees to believe that they owed dues to D.C. 1707 immediately upon ratification of the agreement. The memorandum clearly meant that for current employees, dues were owed within thirty days of the agreement's ratification, a date well after the day the decertification election was held.[19]

Finally, the Hearing Officer's interpretation of the agreement's Union Security section is contrary to established board principles of contract interpretation, the provision's plain meaning and her own restatement of the clause. Article 2, Section 2 of the agreement states: "[a]ll employees covered by this Agreement, as a condition of employment, shall be or become members in good standing of the Union no **later than the thirty-first day fol lowing the beginning of employment hereunder,** [sic] (emphasis supplied). Joint Exhibit 1, p.2. In the RRO, Hearing Officer Belfiore indicates this provision means that "employees were required to become members in good standing of the Union no later than thirty-one days following the beginning of employment under the contract."(emphasis supplied) RRO, p. 23. Current employees did not commence working under the contract until it became effective on

[19] While the memorandum also stated that union dues were owed thirty days from the start of employment, this alternative, which was written in the conjunctive, would have made no sense for individuals who were already employed by COI. Given that the memorandum also indicated that dues were owed thirty days from ratification of the agreement, this entire sentence could only have made sense if the employee applied the alternative that occurred later in time for her or him.

October 20, 2011. Thus, under her restatement of employees' legal obligation to pay dues and initiation fees, she acknowledged that current employees had thirty one days from October 20, 2011 (November 20, 2011) to pay dues and initiation fees.

In fact, the plain meaning of this clause permits no other interpretation. The agreement provides that the date by which employees must become members of the union (and thus commence paying dues and fees), is thirty one days from the date that employees began employment **hereunder**. As Hearing Officer Belfiore acknowledges, the word "hereunder" in that phrase refers to the agreement. Thus, for employees who were employed at the time of the ratification vote, their payment obligation to D.C. 1707 manifested thirty-one days from the date they started working under the terms of the agreement, which for them was the date it first became effective. For employees who commenced working after the agreement's effective date, their payment obligation attached thirty one days after their first date of employment, which for them was the date they first commenced working under the agreement's terms.

However, assuming for the sake of argument that Article 2, Section 2 of the agreement is deemed ambiguous, it is incumbent upon the NLRB to interpret this clause in such a matter as to render it legal and enforceable because its words lend itself to such a construction. *General Teamsters, Local 982*, 181 NLRB 515, 517 (1970) (If a "clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law."). It is well settled that the NLRB has adopted a rule of contractual interpretation requiring that "ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legally enforceable." *Walsh v. Schlecht*, 429 U.S. 401, 408, 97 S.Ct. 679, 50 L. Ed. 2d 641

(1977); *National Labor Relations Board v. Local 32B-32J Service Employees International Union*, 353 F. 3d 197 (2nd Cir. 2003); *Ace Care & Limousine Service, Inc.*, 357 NLRB No., 43 (2011); *Flying Dutchman Park, Inc.*, 329 NLRB 415, 419 (1999) ("That a union security clause may contain terms that are ambiguous is not a basis to find that the clause is unlawful on its face."). It is clear from the proceeding paragraph that the agreement's Union Security provision lends itself to an interpretation that renders it legally enforceable. Hearing Officer Belfiore's failure to heed this well established rule of contractual interpretation is reversible error.

Hearing Officer Belfiore interpreted the Union Security provision to mean that employees have only 31 days from the beginning of their employment to commence paying dues. RRO, p. 23, fn. 41.[20] This interpretation would render the security provision defective because employees employed at least thirty one days prior to the date the agreement became effective would not be afforded the statutorily required thirty day grace period prior to their being required to join D.C. 1707 as a condition of employment. *Chicago Typographical Union, No.16*, 268 NLRB 347 (1983); NLRA § 8 (a)(3). Thus, she questioned the legality of the clause. *Anderson Express Ltd.*, 126 NLRB 798 (1960) (unlike the contract considered in *Anderson Express*, however, the agreement did not have retroactive application. Here, employees were subject to all its terms commencing on October 20, 2011). See Jt Exh. 1. This *dicta*, however, is not in accord with established rules of contractual interpretation required by the NLRB.[21] Hearing Officer

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[20] Her interpretation fails to give any effect to the word "hereunder" in the clause. It thus violates a fundamental tenant of contractual interpretation that "an interpretation which give reasonable. . . and effective meaning to all the terms [of a contract] is preferred to an interpretation which leaves a part unreasonable . . . or of no effect." See Restatement 2nd, Contracts, § 203 (a).

[21] It is also not in accord with NLRB precedent that a union security clause is presumed legal unless an unfair labor practice proceeding deems it to be illegal. *Continental Composition, Inc.*, 273 NLRB 942 (1984). No previous determination of illegality exists here.

Belfiore was duty bound to interpret this clause in a manner that rendered it legally enforceable because its wording permitted such an interpretation: that bargaining unit members who were employed before the ratification vote had thirty one days from the agreement's ratification/effective date to commence paying dues and fees to D.C. 1707 since that was the first date they began working under it.[22]

Thus, contrary to the RRO's determination, there was no enforceable dues obligation that D.C. 1707 had promised would be extinguished prior to the decertification election. Without the six month dues waiver, according to a proper reading of the agreement's Union Security provision, the earliest that bargaining unit members could have been legally required to pay union dues was November 20, 2011, ten days **after** the decertification election.[23]

The RRO's determination that D.C. 1707's waiver here is equivalent to conduct that the NLRB found objectionable in *Go Ahead North America*, 357 NLRB No. 18 (2011) is clearly erroneous. In that decision, the NLRB found that a union's waiver of members' back dues obligation constituted an objectionable grant of a financial benefit and directed the conduct of a second election. There, union members had a palpable obligation to pay previously owed union

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[22] Most traditional union security provisions state that: "membership in the Union, as a condition of employment, shall be required on the thirty-first (31st) day following the beginning of employment, or the effective date of this Agreement, whichever is later." *Office & Professional Employees International Union, Local 29*, 317 NLRB 1220, 1221 (1995). These clauses provide a time frame for current employees to become members of the union (31 days from the agreement's effective date) and a time frame for prospective employees to become members of the union (31 days from the beginning of employment). The Union Security clause at issue here combines the two time frames into one provision that requires employees to join within thirty one days of their beginning work under the agreement, the time frame that is applicable is dependant upon when the employee actually commenced working. Current employees commenced working under the agreement when it became effective. Prospective employees will commence working under the agreement upon their date of hire. The fact that this union security provision combines the two time frames does not in and of itself render it defective. *Flying Dutchman Park, Inc.*, 329 NLRB 415, 419 (1999).

[23] It is unlikely that COI's bargaining unit members would have had an obligation to pay dues even on November 20, since, as Green had testified, clerically it was difficult to get all the dues authorization cards signed at once. See Tr., pp. 127-128. The actual date would have been sometime after November 20.

dues at the time of the decertification election, an obligation that the union agreed to waive prior to the conduct of the election. In that circumstance, the dues waiver could have affected the outcome of the election since union members who might have desired to decertify the union would be dissuaded from doing so to extinguish their present dues obligation. The union, in effect had purchased their votes.

Here, opponents of the D.C. 1707 have no economic incentive to vote in favor of union representation. If the union is decertified they would have absolutely no financial obligation to the union, whereas if the union retained certification they would have a deferred obligation to pay union dues. Certainly, this would not provide union opponents with an incentive to vote for continuation of union representation. Here, in contrast to *Go Ahead North America*, the union had not purchased votes. See also, *McCarty Processors, Inc. and McCarty Farms Inc.*, 286 NLRB 703, 704 (1987).

Finally, D.C. 1707's dues and initiation fees waiver is distinguishable from the initiation fee refund encountered in *Teamsters Local 952 (Pepsi Cola Bottling)*, 305 NLRB 268, 275 (1991). There, the NLRB held that the union had violated Section 8(b)(1)(A) of the Act because it had given members an initiation fee refund several days before a decertification election.[24] That decision is analogous to the NLRB's decision in *Go Ahead North America* since in both cases members had a legally binding obligation to pay fees or dues to the union at the time of the waiver/refund. Since bargaining unit members had received a "tangible economic benefit" from the union prior to the representation election, it was deemed an improper inducement to secure

[24] *Teamsters Local 952* concerned an unfair labor practice charge, not election objections, so the remedy did not involve the conduct of a new election.

support and the union's conduct was found to be objectionable.

As noted previously, D.C. 1707's waiver did not confer a tangible economic benefit since, at the time of the waiver, no one was under a legal obligation to pay dues or initiation fees. Nor could such a waiver serve as an inducement to win support since union opponents would not have obtained any greater economic benefit if the union won the election. If the union was decertified, union opponents would have no financial obligation to the union. However, if the union retained bargaining status, in six months they would have an obligation to pay. Clearly, the waiver could not have effected bargaining unit members' voting choice.

For these reasons, Objection Number 2 should be overruled and the NLRB should reject RRO's recommendation that it be sustained.

B. Objection Number 3 Was Properly Overruled

In election Objection No. 3, COI presented an alternative basis for finding the conduct at issue in Objection No. 2 to be objectionable.[25] COI asserts that D.C. 1707's six month dues and fee waiver was a unilateral modification of the union security provisions of the agreement that *a fortiori* affected the outcome of the election.

The agreement, however, does not actually contain any requirement that bargaining unit members pay dues. See Art 2, Joint Exhibit 1. The requirement that union members pay dues is actually the product of D.C. 1707's constitution, which is not incorporated into the agreement and is thus not enforceable by COI. Joint Exhibit 2, Article III, Section 2.[26] Since D.C. 1707's dues

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[25] It seems unlikely that Objection No. 3 could be found meritorious if Objection No. 2 is not since they are premised upon identical conduct.

[26] The fact that COI's bargaining unit members had their dues and initiation fees waived does not mean that they are not members of D.C. 1707 with all the rights and privileges of union membership.

waiver did not violate specific terms of the agreement, COI cannot complain that D.C. 1707 unilaterally modified the agreement by implementing the waiver. Further, D.C. 1707's constitution does not contain any section that prohibits the union from periodically waiving enforcement of its dues requirement and there is a section that permits exemptions and modifications to the union's initiation fees. Joint Exhibit 2, Section 2(h). D.C. 1707's conduct here was not at odds with its constitution.[27]

It is also evident that a union does not *per se* engage in objectionable conduct if it waives enforcement of the membership initiation fee and dues requirements of its constitution during a representation election. *Paolo's Continental Restaurant, Inc.*, 213 NLRB 557, 562 ("[e]ven assuming, *arguendo*, that the previous Constitution [which did not specifically provide for initiation fee reduction] was in effect, the offer of a reduction of the initiation fee for all employees if the union won the election does not constitute an unlawful inducement within the meaning of the decision of the Supreme Court in *Savir Mfg. Co.*, 414 U.S. 270"]; *Sumter Plywood Corporation*, 215 NLRB 227, 230 (1974)("[n]or is the dispensation [of the constitutionally required initiation fee] practice utilized herein the type of vote buying involved in *Savir Mfg. Co.*, 414 U.S. 270. The waiver of the initiation fees applied to all employees joining a newly established local during the 90 days after the Union entered into the first contract and then established such a local"). It is also clear that a union's waiver of its Union Security clause does not constitute illegal conduct. *Laborers' International Union of North America*, 322 NLRB 294 (1996).

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[27] D.C. 1707's constitution Article X, Section 5 states that "the provisions of this constitution shall be liberally construed, except where the contrary is specifically enjoined." Joint Exhibit 2, p. 16.

Nor can it be said that the six month dues and initiation fee waiver unilaterally changed the substantial and material terms and conditions of employees' employment, assuming that there are NLRB decisions holding that a union's decision not to enforce its union security clause was an unlawful unilateral change.[28] At the time the agreement was ratified, bargaining unit members were not under any obligation to pay dues or initiation fees because of D.C. 1707's general waiver policy for new bargaining units. Thus, the terms and conditions regarding dues and initiation fees applicable to COI bargaining unit members at the time of the agreement's effective date remained unchanged since dues collection had not yet commenced.

Nonetheless, these facts are moot here because the NLRB has no authority to adjudicate an unfair labor practice charge in the context of a representation proceeding. *Mistletoe Express Service*, 268 NLRB 1245 (1984); *Paragon Products Corp.*, 134 NLRB No. 86 (1961). The Hearing Officer properly refrained from doing do here.

For these reasons, the RRO properly recommended that Objection No. 3 be overruled. The NLRB should adopt this recommendation.

IV.

CONCLUSION

In the RONH, Region 29's Acting Regional Director referred Objections No. 2 and 3 to a hearing because he believed that the evidence submitted with the objections was unclear in several respects. See RONH, pp. 12-13. As a result of the hearing, the evidence now conclusively reveals that both of these objections should have been overruled. Below are

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[28] A unilateral change in terms and conditions of employment violates the National Labor Relations Act (Act) only if it is material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). As remarked in the RONH, Region 29 has not found any decision holding that a union's failure to enforce its contract's union security clause is an unfair labor practice.

irrefutable facts that mandate this result:

1. Prior the November 10, 2010 decertification election, bargaining unit members did not have any legally enforceable obligation to pay dues and/or initiation fees to D.C. 1707.

2. No bargaining unit members had signed authorization cards and/or checkoff forms before the waiver/notification of the waiver.

3. The dues and initiation fee waivers were available to all employees both before and after the election regardless of whether or not the employee supported the union before the election.

Based upon the case law discussed herein, these conclusions should have compelled the Hearing Officer to overrule COI's Objection No. 2, as well as No. 3. Her failure to do so mandates reversal of her recommendation with regard to Objection No. 2. This objection should have been overruled. As all objections raised by COI should have been overruled, the results of the November 10, 2011 decertification election must be certified.

March 6, 2012
New York, N.Y.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Community Options NY, Inc.,
Employer

and

Case No. 29-RD-066106

Albert Maul Teekasingh
An Individual

and

Community and Social Agency Employees' Union,
District Council 1707, American Federation of
State, County and Municipal Employees
Union

Certificate of Mailing

Harvey S. Mars, Esq., hereby certifies that he is over eighteen years of age and that on March 6, 2012 he caused the Union's Exceptions to Hearing Officer's Report and Recommendations on Objections and the Union's Brief in Support of its Exceptions to Hearing Officer's Report and Recommendations On Objections to be served on the following parties by first class mail:

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